No. 11454

In The United States Circuit Court of Appeals For the Ninth Circuit

R. P. BONHAM, District Director, Immigration and Naturalization Service, *Appellant*

vs.

HELENE EMILIE BOUISS, *Appellee*

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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HON. PAUL J. McCORMICK, Judge

Brief of Appellee

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JURISDICTION

This is a habeas corpus proceeding wherein the jurisdiction of the District Court and of the Appellate Court have been invoked under the provisions of Title *28 USCA, Section 452,* and Title *28 USCA, Section 463.*

Appellee heretofore submitted to this court a motion to dismiss the appeal. The motion was denied. Appellee again respectfully contends that this court has no jurisdiction to entertain the appeal for the following reasons:

(1) That appellant, R. P. Bonham, who filed the Notice of Appeal herein, *was not a party to the proceeding in the District Court and was not substituted as a party to the proceeding in the District Court at any time prior to the taking of said appeal* by him and by reason thereof this court is without jurisdiction to entertain this appeal;

(2) That George W. Tyler, Acting District Director, Immigration and Naturalization Service, who was the sole respondent in the District Court, did not take any appeal herein at any time within the time allowed by law or at all, and the time of the said George W. Tyler to take an appeal from the judgment in which R. P. Bonham purports to appeal from expired.

That the court has no jurisdiction of this appeal is based upon the authority of Title *28 USCA Section 780,* and the authority of Davis vs. Preston, *280 U. S. 406;* Rule 73 (a)

(b) Federal Rules of Civil Procedure.

ABSTRACT OF THE CASE

Appellee is an alien woman, born in Kobe, Japan, and is one-half blood of the Japanese race and one-half blood

of the white race, her mother being Japanese and her father German. Appellee is lawfully married to John Anthony Bouiss, a citizen of the United States and an honorably discharged war veteran of the Second World War. This marriage occurred on the high seas while she and her husband were en route from Japan to the United States. Upon arrival in the United States appellee was removed to the Immigration Station in Seattle and accorded a hearing before a Board of Inquiry. The Commissioner of Immigration and Naturalization acting on behalf of the Attorney General entered an order excluding appellee from the United States on the ground that under Section 13 (c) of the Act of May 26, 1924, she was an alien ineligible to citizenship, and not entitled to enter the United States under any exception of the law. The order was approved by the Board of Immigration Appeals and appellee was ordered excluded.

A petition for a Writ of Habeas Corpus on behalf of appellee was filed. The sole respondent named in the petition was George W. Tyler, Acting District Director, Immigration and Naturalization Service, Seattle, Washington. It was alleged in said petition that the exclusion order was unlawful, null and void, in that as the wife of a

citizen of the United States, serving in the Armed Forces of the United States she was lawfully admissible to the United States as a non-quota immigrant under Section 4 (a) of the Immigration Act of 1924, and by virtue of Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, Title 8 USCA Section 232.

The Honorable Paul J. McCormick, Judge, granted the petition and appellee was ordered released.

George W. Tyler, *who was the sole respondent* in the District Court *did not appeal* from said order discharging appellee from custody. *No substitution from Tyler to R. P. Bonham as appellant was made in the District Court.* After the appeal was filed in the Circuit Court appellee submitted a motion to dismiss the appeal for the reasons heretofore given under the topic "jurisdiction." (page 1) The motion was denied and the application of appellant to be substituted was granted.

THE
APPELLATE COURT HAS NO JURISDICTION
LAW AND AUTHORITIES

Title 28 USCA, Section 780 is permissive only. It

authorizes substitution of a party under the conditions and as described by the statute. *Davis vs. Preston,* 280 U. S. 406.

One who is not a party to a record and judgment is not entitled to appeal therefrom.

Rule 73 (a) (b) Federal Rules of Civil Procedure;

Ex Parte Leaf Tobacco Board of Trade, 222 U.S. 578, 32 S.Ct. 833;

West vs. Radio-Keith-Orpheum Corp., 70 Fed. (2) 621;

Rose vs. Bank of America, 86 Fed. (2) 69 (CCA-9).

ARGUMENT

In the District Court George W. Tyler *was the sole party* respondent. He filed no notice of appeal from the order allowing the writ. Thereafter, *without any substitution of parties in the District Court,* appellant Bonham filed a notice of appeal. (Tr. p. 20)

The right to appeal and the time, conditions, and the party by whom the right is to be exercised, must not be confused with and is independent of the question of sur-

vivor of the proceedings and of the right of substitution. *Section 780, Title 28 USCA* is permissive only. It authorizes substitution of a party under the condition and as described by the statute. *It does not attempt to enlarge or affect the time in which an appeal must be taken, nor does it affect the question as to who is the proper party to take the appeal.* It is well established law that *one who is not a party to a record and judgment is not entitled to appeal therefrom. Ex Parte Leaf Tobacco Board of Trade*, etc., 222 U.S. 578; *West vs. Radio-Keith-Orpheum Corp.*, (CCA-2) 70 Fed (2) 621.

The statute, *Section 780, Title 28 U.S.C.A.*, relative to survival of actions, etc., would not, nor does it purport to give the successor any additional time to take an appeal. That statutory time remained unchanged.

In *Davis vs. Preston,* 280 U.S. 406-50 S.C. 171, an action was prosecuted against Davis, "Federal Agent," under the railroad act. After the entry of judgment against Davis as Federal Agent, and before the time in which to take an appeal expired, Davis ceased to be "Federal Agent" and Andrew W. Mellon was appointed to succeed him. After Davis ceased to be Federal Agent an appeal from the judgment was taken in his name and was per-

fected. The court dismissed that appeal because Davis had no right to take an appeal after he ceased to be Federal Agent. Thereafter and after the statutory time for appeal expired Andrew W. Mellon applied to the Supreme Court for his substitution in place of Davis. The court held:

> "But the motion must be denied. *The succession in office,* as now appears, *occurred before there was any effort to obtain a review of this Court.* After the succession, Davis was completely separated from the office and without right to invoke such a review or exercise any authority or discretion in that regard. Therefore his petition must be disregarded. The time within which such a review may be invoked is limited by statute, and that time has long since expired. *To grant the motion in these circumstances would be to put aside the statutory limitation and to subject the party prevailing in the state court to uncertainty and vexation which the limitation is intended to prevent.*
>
> The *provisions relating to substitution* which were added to section 206 of the Transportation Act of 1920 by the Act of March 3, 1923, c. 233, 42 Stat. 1443 (49 USCA Sec. 74) are cited in support of the motion. But, even when they are liberally construed, as they probably should be, they *disclose no purpose* either (a) to enable a former Federal Agent to invoke a review by this Court of a judgment which is of no legal concern to him, or (b) to *modify or enlarge* the *prescribed statutory period* for invoking the reviewing power of this court." (Emphasis supplied)

Neither would the statute *nor the Federal Rules of Civil Procedure* give the successor the automatic right to

take an appeal in a proceeding *to which his predecessor was the sole party.* The right of the successor to take an appeal could accrue *only after he had procured his substitution in* the *district court as a party to the proceeding.* This right could have been obtained upon application before the time to appeal elapsed. Then only would he stand in the position which would give him the right *to initiate and prosecute an appeal.*

There is no hardship in such a construction. Why should a successor of a party be given any greater privileges and an extension of time because his predecessor saw fit to remain inactive for a substantial period of the time allowed by the statute for the taking of an appeal?

It may be that the predecessor in office did not regard an appeal necessary or desirable and was satisfied with the decision of the lower court. If the successor in office deemed it important and necessary that an appeal should be procured it behooved him to take the proceedings necessary in the district court to place him in the position *as a party to the record* which would enable him to take an appeal. This he had to do as outlined *in Section 780* and it had to be done *in time* to accomplish his substitution *before the expiration of the time for taking of an appeal.*

It will be noted that *Section 780* authorizes substitution in a pending proceeding. *In the federal courts the commencement of an appeal is an independent proceeding.* There was no appeal pending when the successor assumed office. There was, however, a proceeding pending in the District Court. While judgment had been entered in the case in the District Court the law is well settled that an action is deemed pending until the time for appeal expires. The only action that was pending at the time of the filing of the notice of appeal by Bonham, the appellant, was the action in the District Court. *It was in that action that he had a right to apply for substitution and thereafter to give a notice of appeal.* But the right of substitution in a pending action is not the same as the right to initiate a new proceeding in another court.

Rule *73* (a) *Federal Rules of Civil Procedure,* provides:

> "When an appeal is permitted by law from a district court to a circuit court of appeals *and within the time prescribed, a party* may appeal from a judgment by filing with the district court a notice of appeal * * *" (Emphasis supplied)

Rule 73 (b)

> "The notice of appeal *shall specify the parties* taking the appeal; * * *" (Emphasis supplied)

In the case at bar Tyler was the sole respondent. *Bonham,* the appellant, *was not made a party to the record.* He did not petition the District Court to be made a party until *after the attempted appeal was docketed in the Circuit Court* and *after the time allowed to give notice of appeal in the District Court.* Therefore, not being made a party within the time allowed by law, the notice of appeal was ineffectual to give the appellate court jurisdiction.

PROPOSITION OF LAW

A woman, even though ineligible to citizenship, if the wife of a United States Citizen of Second World War, is admissible as a non-quota immigrant by virtue of 8 U. S. C. A. Section 204 (a), and Public Law 271, 79th Congress, Chap. 591.

LAW AND AUTHORITIES

Public Law 271, 79th Congress Chapter 591, 8 U. S. C. A. Section 232;

Ex parte Chiu Shee, 1 Fed. (2) 798;

Ex parte Cheung Sum Shee, 2 Fed. (2) 995;

Schouler, (6th Edition), Section 3.

Towne vs. Eisner, 245 U.S. 418.

First National Bank & Trust Co. vs. Beach, 301 U.S. 435.

ARGUMENT

The position taken by appellant to the effect that solely by reason of appellee's ineligibility to citizenship, she is not admissible to the United States, is untenable, if full effect is given to *Public Law 271, 79th Congress, Chapter 591,* approved December 28, 1945, 8 U.S.C.A., Sec. 232. This remedial statute which was passed during a period of war to expedite the admission to the United States of alien spouses of citizen members of the United States armed forces is in pari materia with Section 4 (a) of the Immigration Act of 1924, 8 U.S.C.A. Section 204.

When the Congress had for consideration Section 13 (c) of the Immigration Act of 1924, which denies admittance to those ineligible to citizenship, the report of the House Committee stated specifically, that wives of American citizens were exempted from those aliens who were to be excluded.

Ex parte Chiu Shee (District Court, D. Massachusetts, October 17, 1924), 1 Fed. (2d) 798.

"Return on a writ of habeas corpus to obtain the release of a person held for deportation by the immigration authorities, who decided that the Immigration Act of May 26, 1924 (43 Stat. 158), prohibited her from landing. The case is properly before the court, as

it involves the interpretation of a law on which the decision of the immigration officials is not final. Gegiow vs. Uhl, 239, U.S. 3, 36 S.Ct. 2, 60 L. Ed. 114.

These proceedings raise the question whether a Chinese woman, born of foreign parents, who is the wife of an American citizen, is prevented by the recent Immigration Act from entering this country, thus changing the settled law which allows such persons to join the husbands here * * *"

"It will be noticed that subdivision (a) of section 4, which relates to the wives of American citizens, was not included among the exemptions. On this omission the assumption is based that Congress expressly forbade the entry of the wife of an American citizen, if she could not be naturalized. The assumption rests on an insecure foundation and arises from a literal construction of the act, without seeking to ascertain its intention. The result of such a construction would be that Congress showed itself more solicitous for the welfare of an alien minister or professor, whose wife is allowed to enter (section 13 (c) than for that of American citizens. Such a result would be absurd, and we are told by the highest authorities that an act of Congress should not be so construed as to lead to absurdities * * *' 'Nor is such a construction necessary. Section 4 (a), standing alone, would allow a Chinese wife of an American citizen, not only to be admitted, but to be admitted in excess of the quota. *The omission of subdivision (a) of section 4 from the provisions of section 13 arose, not from a settled purpose of Congress to exclude such a wife, but from the fact that in considering section 13 Congress had only aliens in mind, and did not realize that the section as passed diminished the rights of American citizens, already carefully safeguarded by*

section 4 (a). The reason why this inconsistency was overlooked was that *the report of the House Committee stated specifically that wives of American citizens were exempted,* and the chairman of that committee (Mr. Johnson), in the debate in the House, emphasized this feature of the bill. Congressional Record, vol. 65, No. 93 p. 5851. *The discrepancy between section 4 (a) and section 13 (c) is thus reconciled by construing the latter provision as applying only to aliens who are not related to American citizens* * * *'" (Emphasis supplied)

To the same effect is *Ex parte Cheung Sum Shee et al, Ex parte Chan Shee et al.* (District Court, N.D. California, S.D. October 25, 1924.) *2 Fed. (2d) 995.*

It is true that the position of the courts in the above cases was not accepted in *Chang Chan vs. Nagle,* 268 U.S. 346. That case involved American born Chinese claiming the right to bring into the United States their Chinese wives and children. That case was decided May 25, 1925. *It did not have a background of a global war involving the occupation of foreign lands by young American soldiers, and the normal inclination of fraternizing with peoples of such lands.* The words of a statute "are not phrases of art with a changeless connotation," and should vary with the circumstances and where the real intent of Congress can be obtained without absurdity and discrimination a broad

interpretation to its acts should be given in order to avoid inhumane results.

The Act of December 28, 1945, *59 Stat. 659,* Chap. 591, Public Law 271 provides, inter alia; Section 1:

> " * * * That notwithstanding any of the several clauses of Section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens * * * alien spouses * * * of United States citizens serving in, or having an honorable discharge certificate * * * shall if otherwise admissible under the immigration laws * * * be admitted to the United States * * *"

Section 2:

> "Regardless of Section 9 of the Immigration Act of 1924, any alien admitted under section 1 of this Act shall be deemed to be a nonquota immigrant as defined in section 4(a) of the Immigration Act of 1924."

Now it is apparent that *Section 1* of the above Act relates to the exclusion of those undesirable aliens *under the Act of February 5th, 1917,* but Section 2 provides, in all events, the alien spouse was admissible as a nonquota immigrant by virtue of *Section 4(a) of the Act of 1924* (8 U. S. C. A. 204). The phrase *"if otherwise admissible"* in Section 1 relates solely to those aliens *who were excluded under section 3 of the Act of 1917* and has nothing to do with Section 13(c) of *the Act of 1924.* If Congress intended to

exclude alien spouses who were *"ineligible to citizenship"* it is respectfully submitted that it would in plain language have so declared. However, Congress, specifically referred in Section 1 *to the Act of 1917,* which Act established the standard of admissibility of aliens, and that explains its use of the phrase "if otherwise admissible" instead of "eligible to citizenship." *Section 1, relates to the Immigration Act of 1917 and SECTION 2 RELATES TO 4(a) OF THE IMMIGRATION ACT OF 1924.*

We do not believe that Congress in enacting *Public Law 271, supra,* had in mind a discriminatory intention. We do not believe that it was intended to extend to one class of citizen members of the United States armed forces serving in one part of the world the natural privilege of entering into marriage contracts, with their wives to emigrate to the United States and inviting other citizen members of the United States armed forces serving in another part of the world to live lives of concubinage, licentiousness and lewd cohabitation. The Armed Forces had no free choice of place of service. Many a young man was taken from his family and sent to every country on the globe, and it was not wholly unexpected that much courtship ensued. Thousands upon thousands of young men were taken from

their normal surroundings and transported to every section of the world. And the Hon. Paul J. McCormick, in the case at bar, recognized and gave expression to this normal social behavior, and interpreted Public Law 271 in its broadest scope, and said: (Tr. p. 16)

> "This remedial statute was enacted in a post-bellum environment which found millions of the personnel of the armed forces of the Nation in distant and widely separated foreign areas around the globe. Its broad and comprehensive terms clearly state the purpose and object which Congress sought to accomplish by this legislative innovation. The intent to keep intact all conjugal and family relationships and responsibilities of honorably discharged service men of the Second World War is clearly expressed, and the obvious purpose to safeguard the social and domestic consequences of marriage of service men while absent from the United States must take precedence over a generalized phrase which if interpreted along purely racial lines would frustrate the plain purpose of the whole statute. Such a construction should not be adopted."

See *Holy Trinity Church vs. United States,* 143 U.S. 457;

Ozawa vs. United States, 260 U.S. 178 at page 194;

Cabell vs. Markham, (C.C.A. 2, 1945), 148 F. 2d 737;

United States vs. 21 Pounds 8 Ounces of Platinum, (C.C.A. 4, 1945), 147 F. 2d, 78.

The court was giving a comprehensive interpretation to the remarks of *Schouler*, (6th Ed.) Section 3:

"Whether we consult the facts of history or the inspirations of human reason, the family may be justly pronounced the earliest of all social institutions. Man, in a state of nature and alone, was subject to no civil restrictions. He was independent of all laws, except those of God. But when united with woman, both were brought under certain restraints for their mutual well-being. The propagation of offspring afforded the only means whereby society could hope to grow into permanent and compact system. Hence the sexual cravings of nature were speedily brought under wholesome regulations; as otherwise the human race must have perished in the cradle. Natural law, or the teachings of a Divine Providence, supplied these regulations. Families preceded nations. * * *

The supremacy of the law of family should not be forgotten. We come under the dominion of this law at the very moment of birth; we thus continue for a certain period, whether we will or no. Long after infancy has ceased, the general obligations of parent and child may continue; for these last through life. Again, we subject ourselves by marriage to a law of family; this time to find our responsibilities still further enlarged. And although the voluntary act of two parties brings them within the law, they cannot voluntarily retreat when so minded. To an unusual extent, therefore, is the law of family above, and independent of, the individual. Society provides the home; public policy fashions the system; and it remains for each one of us to accustom himself to rules which are, and must be arbitrary.

So is the law of family universal in its adaptation. It deals directly with the individual. Its provisions are for man and woman; not for corporations or business

firms. The ties of wife and child are for all classes and conditions; neither rank; wealth, nor social influence weighs heavily in the scales. To every one public law assigns a home or domicile; and this domicile determines not only the status, capacities, and rights of the person, but also his title to personal property. There is the political domicile, which limits the exercise of political rights. There is the forensic domicile, upon which is founded the jurisdiction of the courts. There is the civil domicile, which is acquired by residence and continuance in a certain place. The place of birth determines the domicile in the first instance; and one continues until another is properly chosen. *The domicile of the wife follows that of the husband;* the domicile of the infant may be changed by the parent. *Thus does the law of domicile conform to the law of nature.*"

The doctrine announced in *Holy Trinity Church vs. U. S., 143 U.S. 457,* should be applied in this case. In interpreting congressional acts we also quote *Towne vs. Eisner, 245 U.S. 418*:

"A word is not a crystal, transparent and unchanged; it is the skin of a living thought *and may vary greatly in color and content according to the circumstances and the time in which it is used.*" (Emphasis supplied)

And also, *First National Bank & Trust Co. of Bridgeford vs. Beach, 301 U.S. 435*:

"We emphasize the fact afresh that the words of the statute to which meaning is to be given *are not phrases*

of art with a changeless connotation. They have a color and a content that may vary with the setting." (Emphasis supplied)

We submit that Congress did not intend to favor American soldiers in respect to their marital life who serve in one part of the world as against those serving in another part. *Congress did intend to preserve the marital status of the members of the armed forces all over the world.*

CONCLUSION

It is again respectfully submitted that appellant was not made a party to the record in the lower court and therefore has no standing to affect an appeal. It is also respectfully submitted that the conclusion reached by the lower court is in keeping with the intent of Congress and should be affirmed.

Respectfully submitted,

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